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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 United States of America,
10 Plaintiff,

11 vs.

12 Mike Nunez,
13 Defendant.

No. CR 11-02217-TUC-DCB (BPV)

**REPORT AND
RECOMMENDATION**

14 On June 22, 2011, Defendant Mike Nunez was indicted for possession with intent
15 to distribute less than 50 kilograms of marijuana (Doc. 5). On June 2, 2011, Defendant
16 filed a Motion to Dismiss or Suppress Evidence (Doc. 15). The Government filed its
17 Response on September 15, 2011. (Doc. 17)

18 The matter came on for Evidentiary Hearing before the Court on October 7, 2011.
19 The Government called as a witness Tohono O'odham Police Department Detective
20 Denver Calabaza. The Defendant called no witnesses. Thereafter, the Government filed a
21 supplemental response. (Doc. 26)

22 The Court, having considered the briefing, arguments, and evidence presented,
23 recommends that the District Judge, after his independent review and consideration, enter
24 an order DENYING Defendant's Motion to Dismiss or Suppress.

25 **FACTS**

26 On May 25, 2011 at approximately 7:40 p.m., Tohono O'odham Police
27 Department (TOPD) Detective Denver Calabaza was patrolling the Village of Sells with
28 Detective Antone, and observed two sedans unknown to him traveling in tandem at a

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2 high rate of speed through the intersection of Bobcat Circle and Quail Road. Detective
3 Calabaza did not observe the gender of the driver of the second sedan as it passed him at
4 this intersection. Detective Calabaza followed both sedans, and after the first sedan
5 turned off the main road onto a dirt road, Detective Calabaza did not follow that vehicle,
6 but was able to obtain the driver's license of the second vehicle they were following.
7 Detective Antone called dispatch to run the license plate, and determined that the
8 registered owner of the vehicle, Stephanie Viegas, had a TO Nation warrant for her
9 arrest. Based upon this information Detective Calabaza initiated a traffic stop on the
10 second sedan at 7:48 p.m.

11 The driver of the car was a male Hispanic, later identified as Defendant Mike
12 Nunez. Detective Calabaza testified that he was not aware the driver was a male until he
13 stopped the vehicle and shined a light on the driver. Nunez provided a driver's license,
14 registration and proof of insurance to Detective Calabaza, who handed the driver's
15 license to Detective Antone. Detective Antone radioed dispatch and informed Detective
16 Calabaza that Nunez had a suspended license and warrants out of Pima County. Based
17 upon that information, Detective Calabaza proceeded to arrest Nunez and place him in
18 custody.

19 While Nunez was still in the vehicle Detective Calabaza asked him where he was
20 coming from and who the registered owner of the sedan was. Nunez responded with a
21 male's first name which was unknown to the detective, and a residence in Sells. Detective
22 Calabaza requested consent to search the vehicle. Nunez did not consent.

23 Detective Antone called dispatch and requested two things: a cage patrol unit and a
24 canine unit. The cage patrol unit was requested because the detectives were traveling in
25 an unmarked vehicle that did not have a barrier between the driver's seat and the back
26 seat. The detectives placed Nunez by their vehicle awaiting the arrival of the patrol unit.
27 TOPD Officer Liston arrived with the patrol unit at approximately 8:06 p.m., at which
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2 time the detectives walked Nunez, already handcuffed and out of his vehicle, and handed
3 him to Officer Liston.

4 A United States Border Patrol canine unit arrived approximately two minutes after
5 Officer Liston arrived. The detectives met with the border patrol agent, discussed the
6 traffic stop, the detective's discussions with the driver, his actions, and the detective's
7 suspicions, and requested that the Border Patrol agent have his canine perform a dog
8 sniff. The dog sniff took approximately five minutes, and the detectives were informed
9 that the dog alerted to two areas. Based on the alerts, the detectives visually searched the
10 car more thoroughly, and opened up the trunk of the sedan. The trunk contained four
11 large bundles of marijuana packaged in contact paper.

12 DISCUSSION

13 Defendant first argues that he was arrested without probable cause. Defendant
14 argues in his memorandum that there was no bad driving basis for the stop, and no
15 information that the vehicle was involved in drug trafficking. (Doc. 15, at 4)

16 As discussed above, however, the traffic stop was lawful. The registered owner of
17 the car had an active TO Nation warrant for her arrest. At the moment the detectives were
18 aware of that information, the TOPD detectives had probable cause to pull the car over.
19 *See United States v. Diaz-Castaneda*, 494 F.3d 1146, 1153 (9th Cir. 2007). While the
20 officers in *Diaz-Castaneda* could confirm that the physical description of the registered
21 owner of the vehicle who was believed to be driving with a suspended license matched
22 the physical description of the driver of the suspect vehicle in *Diaz-Castaneda*, in this
23 case, Detective Calabaza was unable to determine, until he stopped the car, that the
24 physical description of the registered owner did not match the physical description of the
25 driver. The reason for this was the physical attributes of the vehicle Defendant was
26 driving. The first car being driven in tandem was described as having "tinted windows."
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2 (R.T. 10/7/11, at 54) Though Detective Calabaza did not use that same physical
3 description to describe the second car Defendant was driving, he did state that even with
4 his lights illuminating the back window into the car, he was unable to tell how many
5 passengers were in the car, much less what the occupants of the vehicle looked like, and
6 whether the driver was male or female. (*Id.*, at 55) The exhibits submitted of photos of
7 the white sedan confirm that the windows were darkly tinted. This Court finds that until
8 Detective Calabaza had affirmative grounds dispelling the valid justification for the
9 traffic stop, the stop was valid. Whether or not the detectives observations of tandem
10 driving, or not recognizing the vehicles from the area of Sells is irrelevant; the warrant
11 for Ms. Viegas' arrest as the registered owner of the white sedan established a sufficient
12 basis to initiate the traffic stop.

13 Defendant argued during the evidentiary hearing that the stop became invalid after
14 detective's observed the driver of the car was male. (Reporter's Transcript (R.T. 10/7/11,
15 at 65-66). After the hearing, Defendant did not challenge Detective Calabaza's initial
16 decision to run a license plate check on the vehicle and, once he determined there were
17 warrants for the registered owner, stop the vehicle; rather, Defendant argued that at the
18 moment the Detective knew that the driver of the vehicle was not Stephanie Viegas, *i.e.*,
19 the moment he observed the driver was male, and not female, the stop became an illegal
20 detention.

21 Detective Calabaza's request that the Defendant give him his driver's license was
22 not a search under the Fourth Amendment. "In the ordinary course, a police officer is free
23 to ask a person for identification without implicating the Fourth Amendment." *Hiibel v.*
24 *Sixth Judicial Dist. Ct. of Nev., Humboldt County*, 542 U.S. 177, 185 (2004). *See also*
25 *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("[Interrogation relating to one's identity or a
26 request for identification by the police does not, by itself, constitute a Fourth Amendment
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2 Seizure.”) Because Detective Calabaza’s request did not implicate the Fourth
3 Amendment, the argument that such a request was unlawful is without merit. Finally, the
4 duration of the stop in this case was entirely justified by the outstanding warrant on the
5 registered owner of the car and the ordinary inquiries incident to such a stop. Though “[a]
6 seizure that is justified solely by the interest in issuing a [...] ticket to the driver can
7 become unlawful if it is prolonged beyond the time reasonably required to complete that
8 mission,” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), an “officer’s inquiries into
9 matters unrelated to the justification for the traffic stop ... do not convert the encounter
10 into something other than a lawful seizure, so long as those inquiries do not measurably
11 extend the duration of the stop.” *Arizona v. Johnson*, 555 U.S. 323 (2009).

12 Here, Detective Calabaza asked Defendant for his driver’s license immediately
13 upon stopping the vehicle, and handed the license directly to Detective Antone to radio
14 dispatch and check for outstanding warrants. Though the Court does not know the exact
15 amount of time it took to investigate Defendant’s outstanding warrants, the sequence of
16 events as conveyed by Detective Calabaza indicate the inquiry did not measurably extend
17 the duration of the stop. In fact, the patrol car arrived to transport Defendant
18 approximately 18 minutes after Detective Calabaza made the initial decision to stop
19 Defendant. Thus, because the inquiries did not measurable extend the duration of the
20 stop, this was not an unlawful seizure. Defendant argued in his memorandum that “it is
21 apparent that the reason he was put in the patrol car under arrest was because he refused
22 to consent to a search of the vehicle.” (Doc. 15, at 4) The facts elicited at the evidentiary
23 hearing do not support this contention. It is clear that the decision was made by Detective
24 Calabaza to arrest the Defendant because he had two outstanding warrants and was
25 driving on a suspended license.

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27 Defendant next argues that the dog “sniff” and subsequent search was an unlawful
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2 search incident to arrest. (Doc. 6, at 6; R.T. 10/7/11, at 66) The Government, however,
3 does not rely on the legal justifications of a search incident to arrest and submits that
4 *Arizona v. Gant*, 556 U.S. 332 (2009) is not controlling in this case.

5 As applied to a traffic stop,

6 “[a] lawful roadside stop begins when a vehicle is pulled over for
7 investigation of a traffic violation. The temporary seizure of driver and
8 passengers ordinarily continues, and remains reasonable, for the duration of
9 the stop. Normally, the stop ends when the police have no further need to
10 control the scene, and inform the driver and passengers they are free to
11 leave. An officer's inquiries into matters unrelated to the justification for the
12 traffic stop, this Court has made plain, do not convert the encounter into
something other than a lawful seizure, so long as those inquiries do not
measurably extend the duration of the stop.

13 *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (citation omitted).

14 In *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), the Supreme Court made clear
15 that a stop may become “unlawful if it is prolonged beyond the time reasonably required
16 to complete [its] mission.” In this case, because Defendant was lawfully arrested, the time
17 required to obtain the narcotics-detection dog is not at issue. Even if it had been at issue,
18 the entire time, from the time the Detectives determined to make a traffic stop, to the time
19 the narcotics-detection dog arrived, was 20 minutes. The Court finds that this was not an
20 impermissible delay.

21 If a drug detection dog alerts for the presence of illegal narcotics, that alert
22 provides probable cause to conduct a warrantless search pursuant to the automobile
23 exception to the warrant requirement. *United States v. Garcia*, 205 F.3d 1182, 1187 (9th
24 Cir.2000) (citing *United States v. Ross*, 456 U.S. 798, 807 (1982)). If officers have
25 probable cause to believe that the vehicle contains evidence of a crime, the officers may
26 lawfully conduct a warrantless search of the entire vehicle and its contents. *Ross*, 456
27 U.S. at 825. An officer has probable cause to search if, in the totality of the
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2 circumstances, “there is a fair probability that contraband or evidence of a crime will be
3 found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

4 Here, the dog “sniff” of the exterior of the defendant’s vehicle was not a search
5 because such a “sniff” does not trigger the protections of the Fourth Amendment. The
6 detectives only searched the trunk after the dog alerted to the trunk areas and as *Caballes*
7 states, the dog’s alert is sufficiently reliable to give the detectives probable cause to
8 search the trunk of the defendant’s car.

9 Defendant’s reliance on *Arizona v. Gant*, 556 U.S. 332 (2009) is misplaced. *Gant*
10 addressed the limits of law enforcement’s right to search a vehicle incident to a recent
11 occupant’s lawful arrest. *Gant*, 556 U.S. at 1714. In *Gant*, the defendant was arrested for
12 driving with a suspended license. *Id.* He was arrested outside of but near his vehicle. The
13 officers did not have reason to suspect the vehicle contained any evidence related to the
14 defendant’s arrest for a suspended license. They searched the vehicle simply because the
15 defendant was under arrest and was a recent occupant of the vehicle. Clarifying its ruling
16 in *New York v. Belton*, 453 U.S. 454 (1981) and affirming its prior ruling in *Chimel v.*
17 *California*, 395 U.S. 752 (1969), the Court found police may search a vehicle incident to
18 a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger
19 compartment at the time of the search or it is reasonable to believe the vehicle contains
20 evidence of the offense of the arrest. *Gant*, 556 U.S. at 1723.

21 In the case before this Court, the vehicle was searched because a drug detection
22 canine alerted to the presence of illegal narcotics in the vehicle. Therefore, Defendant’s
23 vehicle was searched pursuant to the automobile exception to the warrant requirement.
24 *United States v. Hatley*, 15 F.3d 856, 858 (1994). It was searched because agents
25 suspected the vehicle itself contained the evidence of a crime.

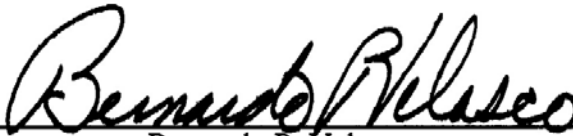
26 **RECOMMENDATION**

27 The Magistrate Judge recommends the District Court, after independent review,
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2 DENY Defendant's Motion to Dismiss or Suppress (Doc. 15).

3 Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and
4 file written objections within fourteen days of being served with a copy of the Report and
5 Recommendation. If objections are not timely filed, they may be deemed waived. The
6 parties are advised that any objections filed are to be identified with the following case
7 number: **CR11-02217-TUC-DCB**

8 Dated this 12th day of December, 2011.

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12 Bernardo P. Velasco
13 United States Magistrate Judge
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